89-764

No.



# In the Supreme Court of the United States

OCTOBER TERM, 1989

DAVID G. RAWLS, PETITIONER

*v.*

UNITED STATES OF AMERICA, RESPONDENT

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS**

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58 pp

## QUESTIONS PRESENTED

I

Whether the Petitioner was denied the due process of law guaranteed by the Fifth Amendment to the United States Constitution when the Court of Military Appeals held that prosecution for drug related offenses under Article 134, U.C.M.J., 10 U.S.C. § 934, which employed 21 U.S.C. §§ 813 and 841, was not preempted by congressional enactment of Article 112a, U.C.M.J., 10 U.S.C. § 912a.

II

Whether 21 U.S.C. § 813, which permits, by operation of law, a controlled substance analogue to be treated as a controlled substance for purposes of establishing an offense under Title 21 of the United States Code, is unconstitutionally vague in that it fails to provide a person of ordinary intelligence with constitutionally adequate notice of what conduct is prohibited, thereby denying petitioner the due process of law guaranteed by the Fifth Amendment to the United States Constitution.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Constitutional Provision | 2 |
| Statement of the Case | 2 |
| Reasons for Granting the Writ | 4, 12 |
| Conclusion | 18 |
| Appendix A | 1a |
| Appendix B | 7a |
| Appendix C | 9a |


## TABLE OF AUTHORITIES


United States Constitution:

Amendment V ..... 2

United States Supreme Court:

*California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983) ..... 10

*Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222, (1972) ..... 11, 13, 15

*Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) ..... 11, 16

*United States v. Mazurie*, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975) ..... 17

*Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1983) ..... 11

United States Court of Appeals:

*United States v. Desurra*, 865 F.2d 651, *reh'g denied*, 868 F.2d 716 (5th Cir. 1989) ..... 16, 18

Page

United States Court of Military Appeals:

*United States v. Kennedy*, 8 U.S.C.M.A. 251, 24 C.M.R. 61 (1957) ..... 7

*United States v. Kick*, 7 M.J. 82 (C.M.A. 1982) ... 9

*United States v. Norris*, 2 U.S.C.M.A. 236, 8 C.M.R. 36 (1953) ..... 4, 7, 8, 12

*United States v. Rawls*, ACM 26926 (A.F.C.M.R. 22 Mar 1989) *rev'd in part, aff'd in part*, ____ M.J. ____, No. 62,342/AF (C.M.A. 29 Sep 89) ..... 2

*United States v. Reichenbach*, ____ M.J. ____, No. 61,504/AF (C.M.A. 25 Sep 1989) ..... 2, 3, 4, 6, 9, 11, 16, 18

*United States v. Tyhurst*, 28 M.J. 671 (A.F.C.M.R. 1989) *certified*, 28 M.J. 268 (1989), *cross-pet denied*, ____ M.J. ____ (30 Aug), *rev'd in part*, ____ M.J. ____ (C.M.A. 29 Sep 1989) ..... 6

*United States v. Wright*, 5 M.J. 106 (C.M.A. 1978) ..... 4, 5, 9, 10

Uniform Code of Military Justice:

Article 112a ..... 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 18

Article 134 ..... 2, 3, 4, 7, 8, 9, 12, 18

United States Code:

10 U.S.C. § 867(h) ..... 1

10 U.S.C. § 912a ..... 2

10 U.S.C. § 934 ..... 2, 7

18 U.S.C. § 1154 ..... 17

21 U.S.C. § 801 ..... 3

21 U.S.C. § 802(32) ..... 14, 15

Page

21 U.S.C. § 812 ..... 3, 6, 8, 10, 11, 14
21 U.S.C. § 813 ..... 3, 4, 5, 6, 10, 11, 12, 18
21 U.S.C. § 841 ..... 3, 4, 11, 12
21 U.S.C. § 851 ..... 3
28 U.S.C. § 1259(3) ..... 1

U.S. Code Cong. and Ad. News:

1983 U.S. Code Cong. and Ad. News 2177, 2182-83 ..... 5
1988 U.S. Code Cong. and Admin. News 4378 .... 6

Federal Register:

52 Fed. Reg. 7103 (1987) ..... 5

Miscellaneous:

Controlled Substances Analogue Act of 1986, Pub. L. 99-570(1986) ..... 5
*Department of Justice Manual* § 9-100.205, at 9-1985 ..... 16
Executive Order 12586 (3 March 1987) ..... 5
J. Cameron, "Synthetic Drug Legislation: Broadening the Classifications by Defining Controlled Substances Analog as a Percentage of Common Structure Elements," 64 *U. Detroit L. Rev.* 775 (Summer 1987) ..... 16
Manual for Courts-Martial, United States (1984) .. 3, 8, 9
Note, *The Controlled Substance Analogue Enforcement Act of 1986: The Compromising of Criminalization,* 16 Am. J. Crim. L. 118-123, 128-129 ..... 16
S.Rep.No. 99-196, 99th Cong., 1st Sess 5 (1985) ... 13
S.Rep.No. 99-848, 99th Cong., 1st Sess. 25 (1986) ..... 16

Page

Uelman and Haddox, *Drug Abuse and the Law Sourcebook* § 3.5 at 3-36 to 3-47 (Release No. 5, October 1988) ..... 16

Texas Revised Civil Statutes article 4476-15, § 2.03(d) ..... 14

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS**

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The petitioner, David G. Rawls, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on September 29, 1989.

## OPINIONS BELOW

The United States Air Force Court of Military Review issued an unpublished decision in this case on March 22, 1989 (Appendix A). The United States Court of Military Appeals decided this case, affirming in part and reversing in part, by summary disposition, on September 29, 1989 (Appendix B).

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3)(Supp. 1989) and 10 U.S.C. § 867(h) (Supp. 1989). The judgment of the United States Court of Military Appeals was entered on September 29, 1989.

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty or property, without due process of law . . .

## STATEMENT OF THE CASE

The petitioner, an Air Force Senior Airman (E-4), was tried by a general court-martial on March 15-17, 1988. Contrary to his pleas he was convicted, by a military judge sitting alone, of, *inter alia,* use and distribution of 3,4-methylenedioxy-methamphetamine (hereinafter MDMA). MDMA is a substance that is treated under 21 U.S.C. § 813, as an analogue of a controlled substance. Conduct involving MDMA allegedly violated Article 112a, Uniform Code of Military Justice (hereinafter U.C.M.J.). The Air Force Court of Military Review affirmed the conviction in an unpublished opinion. *United States v. Rawls,* ACM 26926 (A.F.C.M.R. 22 Mar 89) (Appendix A). The Court of Military Appeals, following its decision in *United States v. Reichenbach,* 29 M.J. 128 (C.M.A. 1989) (Appendix C), summarily reversed the Court of Military Review's decision regarding the use of MDMA. *United States v. Rawls,* No. 62,342/AF, ____ M.J. ____ (C.M.A. 27 September 1989). The Court of Military Appeals, however, affirmed the petitioner's conviction for distributing MDMA. *Id.* In so doing the Court of Military Appeals held, following its decision in *United States v. Reichenbach, supra,* that MDMA was not a controlled substance for purposes of Article 112a, U.C.M.J., "Wrongful use, possession, etc. of controlled substances." The Court of Military Appeals further held, however, the distribution of MDMA was a violation of Article 134, U.C.M.J., 10 U.S.C. § 934, denominated as the "general article". The court held as it did, despite the provision of

the *Manual for Courts-Martial*, Section IV, paragraph 60(c)(5)(a), United States (1984), that "[t]he preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132." In essence, the *Reichenbach* court held Article 112a, U.C.M.J., did not preempt prosecutions under Article 134, U.C.M.J., for drug-related misconduct. *Reichenbach* at 137. The theory for sustaining the petitioner's conviction under Article 134, U.C.M.J. went as follows.

MDMA is an analogue of 3,4-methylenedioxy amphetamine (hereinafter MDA), a controlled substance under 21 U.S.C. § 812(c). Section 813 of 21 U.S.C. states that an analogue of a controlled substance (with a controlled substance being defined by 21 U.S.C. § 812(c)) shall be treated as a controlled substance analogue for purposes of 21 U.S.C. § 801 *et seq.* and 21 U.S.C. § 851 *et seq.* Section 841 falls within the former's parameters. Title 21, Section 841, provides, *inter alia*, that it is unlawful for any person to knowingly or intentionally distribute a controlled substance. Thus, by operation of Section 813, a controlled substance analogue is treated as a controlled substance, with the concomitant penalties and prohibitions associated with controlled substances under Title 21.

The *Reichenbach* court reasoned the distribution of MDMA was the distribution of a controlled substance, by operation of 21 U.S.C. § 813. Further, such distribution was in violation of 21 U.S.C. § 841. Finally, using 18 U.S.C. § 813 the violation of 21 U.S.C. § 841 could be punished as a violation of Article 134, U.C.M.J. *Reichenbach*, 29 M.J. at 136-37. Thus, the Court of Military Appeals held that the preemption doctrine as set forth in the *Manual for Courts-Martial*, was not applicable to the petitioner's conviction, notwithstanding the plain language of the Manual.

A second attack on the petitioner's conviction asserted that 21 U.S.C. § 813 was unconstitutional in that it failed to provide constitutionally adequate notice of the misconduct prohibited. In *Reichenbach* the Court of Military Appeals dismissed this basis of attack in a footnote. *Reichenbach,* at 132, n.5.

## REASONS FOR GRANTING THE WRIT

### I

The Petitioner was denied the due process of law guaranteed by the Fifth Amendment to the United States Constitution when the Court of Military Appeals held that prosecution for drug-related offenses under Article 134, U.C.M.J., which employed 21 U.S.C. §§ 813 and 841, was not preempted by congressional enactment of Article 112a, U.C.M.J.

When Congress enacted Article 112a, U.C.M.J., it intended that misconduct involving controlled substances be defined in terms of violating that statute, thereby preempting prosecution under the general Article, Article 134, U.C.M.J., which addresses military offenses.

The preemption doctrine, applicable to the military justice system, was defined by the Court of Military Appeals in *United States v. Norris,* 2 U.S.C.M.A. 236, 8 C.M.R. 36 (1953). In *Norris,* the Court of Military Appeals set forth a two-pronged test to establish whether the preemption doctrine precluded prosecution for an offense under Article 134, U.C.M.J., *United States v. Wright,* 5 M.J. 106 (C.M.A. 1978). The primary question is "whether Congress intended to limit prosecution [for particular misconduct] to offenses defined in specific articles of the Code; the secondary question is whether the offense charged is composed of a residuum of elements of a

specific offense and asserted to be a violation of . . . the general articles." *Id.*, at 110-11.

Any endeavor to understand the preemption issue vis-a-vis misconduct involving controlled substances must begin with an examination of the nature of the specific statute enacted by Congress to address this particular type of misconduct. The legislative history behind the enactment of Article 112a, U.C.M.J., reflects Congress intended to provide a specific article regarding controlled substances. S.Rep. No. 53, 98th Cong., 1st Sess. 29 (1983); *reprinted in* 1983 *U.S. Code Cong. & Admin. News,* 2177, 2182. While prior to its enactment "prosecutions under Articles 92, 133 and 134 [were] appropriate, Congress traditionally [had] set forth the details of significant offenses in the text of the U.C.M.J." *Id.* The Senate report reflects that the legislature was aware of the detailed statutory scheme set forth in Title 21 of the United States Code for addressing the problem of controlled substances in the civilian sector. *Id.* In fact that scheme, regarding the establishment of controlled substances, is expressly referenced in paragraph (b) of Article 112a, U.C.M.J. Thus, Congress enacted an Article of the U.C.M.J. which comported with the provisions of Title 21, as it existed at the time the Article was enacted on October 27, 1986. Pub.L. 99-570, Controlled Substances Analogue Act of 1986. The *Manual for Courts-Martial* was last amended on June 1, 1987, Executive Order No. 12586, dated March 3, 1987, published at 52 Fed. Reg. 7103 (1987). That amendment did not effect any change to the provisions of the manual regarding prosecution for offenses involving controlled substances. Furthermore, since 21 U.S.C. § 813 was enacted, no change has been legislated by Congress that would affect prosecution under Article 112a, U.C.M.J. Instead, it appears that Congress, by incorporating by reference Title 21 schedules into Article 112a, U.C.M.J., intended not to

change the substance of the Article. Originally, the language of 21 U.S.C. § 813 was self limiting in that it expressly applied only for purposes of "this title [21 U.S.C. § 801 *et. seq.*] and Title III [21 U.S.C. § 851 *et. seq.*]" Pub.L. No. 99-570, *supra,* at § 1202. In 1988, this language was changed so that it now reads "a controlled substance analogue shall, to the extent intended for human consumption, be treated for the purposes of any Federal law as a controlled substance in Schedule I [as set forth in 21 U.S.C. § 812(c)]." Pub.L. No. 100-690, Title VI, § 6470(c), *reprinted in,* 1988 *U.S. Code Cong. & Admin. News* 4378. Thus, this change, which would arguably permit violations of Section 813 to be prosecuted as violations of Article 112a, U.C.M.J., 10 U.S.C. § 912a, became effective after the date of the offenses that are the subject of this petition. This fact is recognized by the Court of Military Appeals. *See, Reichenbach,* 29 M.J., at 135. In fact the Court of Military Appeals questions whether this change alone is sufficient to establish an offense under Article 112a in view of the other requirements imposed by the Statute as enacted by Congress. *Id.* For example, Article 112a(b), U.C.M.J., requires that a substance be "listed" in the schedules set forth by 21 U.S.C. 812(c) before conduct involving the substance constitutes an offense under Article 112(a).

Thus, as the *Reichenbach* court concluded, "we refuse to read Article 112a as some type of military law PAC-MAN, designed to absorb every new drug passed by Congress or ban every new drug mischief." *Reichenbach,* 29 M.J., at 135 (citing *United States v. Tyhurst,* 28 M.J. 671, 675 (A.F.C.M.R. 1989), *certified,* 28 M.J. 268 (1989), *cross-pet. denied,* ____ M.J. ____ (30 Aug), *rev'd in part,* ____ M.J. ____ (29 Sep 89) (*Tyhurst* was a friend of the petitioner here, who was convicted under Article 112a for

conduct involving an analogue substance similar to the one involved in the case *sub judice*).

The petitioner concurs with this conclusion regarding the current state of Article 112a, U.C.M.J. The only method by which conduct involving controlled substances can be the subject of prosecution under Article 112a, U.C.M.J., is for the substance to be listed as required in the statute. Notwithstanding this requirement, it was Article 112a, U.C.M.J., the petitioner was charged, tried and convicted of violating. Thus, the Court of Military Appeals agreed with the defense at trial that the petitioner did not violate the Article charged. The difficulty arises from the court's holding that instead of the Article charged, the petitioner violated a different and broader statute, the violation of which had never before been asserted. Such a holding smacks of "the old concept that command must control and those charged with offenses must be convicted." *United States v. Kennedy,* 8 U.S.C.M.A. 251, 24 C.M.R. 61, 64 (1957). This especially appears to be the case where, as here, an appellate court finds the petitioner not guilty of the charged violation of Article 112a, but resorts to the general article to nevertheless find the petitioner guilty of an offense. This expansive reading of Article 134, U.C.M.J., flies in the face of the drafters' intent in setting forth specific offenses. As the *Norris* court noted, "it was the intent of the drafters [of the U.C.M.J.] to specifically define non-military offenses and leave the general article [Article 134, 10 U.S.C. § 934] 'pretty much only for military offenses.' " *United States v. Norris,* 2 U.S.C.M.A. 236, 8 C.M.R. 36, 39 (1953) (quoting Professor Morgan during the Senate Subcommittee hearings on the U.C.M.J. Hearings before Senate Committee on Armed Services on S.857 and H.R. 4080, 81st Congress, 1st Sess. (1949), (p. 47)). Applying this congressional intent, the Court of Military Appeals concluded "Article 134

should generally be limited to military offenses and those *crimes not specifically delineated* by the punitive Articles." *Norris,* 8 C.M.R. at 39 (emphasis added). The intent of the drafters, as reflected by the comments of Professor Morgan, was incorporated into the Manual for Courts-Martial where it states "[t]he preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132." *Manual for Courts-Martial,* Section IV, paragraph 60c(5)(a), United States (1984) (citing *Norris, supra*).

With the above in mind, the preemption question comes clearly into focus. Congress, in enacting Article 112a, U.C.M.J., clearly designed a criminal statute to address the type of misconduct at issue in the instant case. Additionally, the provisions of the statute itself make it clear that Congress did not intend controlled substance related misconduct be prosecuted under any other provision of the Uniform Code. The evidence of this intent is found in the provisions which permit new substances to be added to the list of controlled substances. Specifically, paragraph (b)(1) and (2) of Article 112a, U.C.M.J., provide that in addition to the substances listed in paragraph (b)(1), controlled substances include any other controlled substance "listed in Schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C. § 812]." Thus, this mechanism permits conduct involving new substances to be the subject of prosecution, after the requirements of Article 112a, U.C.M.J., have been met. Given the ability to expand Article 112a, U.C.M.J., to include new substances and the intent of the drafters to limit the application of Article 134, U.C.M.J., only one conclusion is reasonable. Any misconduct of the type addressed by Article 112a, U.C.M.J., must be a violation of that statute to constitute an offense under the Uniform Code of Military Justice.

Admittedly, the Court of Military Appeals has found cases where the preemption doctrine does not apply, but they are distinguishable from the case *sub judice.* In *Reichenbach,* in support of its position that Article 112a, U.C.M.J., does not preempt prosecution under Article 134, the Court of Military Appeals cited *United States v. Wright* and *United States v. Kick.*

In *United States v. Wright,* 5 M.J. 106 (C.M.A. 1978) the court found that Article 134, U.C.M.J., did not entirely preempt the Assimilative Crimes Act, 18 U.S.C. § 13. The Assimilative Crimes Act is inapposite to the case *sub judice,* because the act requires that the offense occur in a location under exclusive or concurrent federal criminal jurisdiction. That jurisdiction is absent in the instant case. A similar inapposite precedent is found in *United States v. Kick,* 7 M.J. 82 (C.M.A. 1979).

In *Kick,* the appellant was convicted of killing another soldier through simple negligence. The Court of Military Appeals held that the offense did exist under Clause 1[1] or Clause 2[2] of Article 134. As in the case *sub judice,* the *Reichenbach* court concluded "[i]n light of the legislative history of Article 112a . . . enactment of that article precludes prosecution under clause 1[1] or clause 2[2] of Article 134." *Reichenbach,* 29 M.J., at 137. Given the different legal bases for the Court of Military Appeals decisions in *Wright* and *Kick* it is evident that those decisions are not controlling in the case *sub judice.*

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[1] Clause 1 of Article 134 prohibits conduct that is prejudicial to good order and discipline. *Manual for Courts-Martial,* Section IV, paragraph 60c(1), United States, 1984.

[2] Clause 2 of Article 134 prohibits conduct that is service discrediting.

The clear import of the foregoing indicates Congress, and the drafters of the U.C.M.J., clearly intended that offenses involving controlled substances, at least after the enactment of Article 112a, be prosecuted under that article. That article requires the controlled substance be one of the specified substances or a substance listed in the schedule of controlled substances under 21 U.S.C. § 812. The fact that such a requirement is more restrictive than prosecutions under 21 U.S.C. § 841, by operation of 21 U.S.C. § 813, in no way undermines the requirements established by Article 112a, U.C.M.J., which serve as conditions precedent to prosecution for misconduct involving controlled substances. *Cf, California v. Ramos,* 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983) ("It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires." *Id.*, 103 S.Ct., at 3460). Thus, the first prong of the preemption test must be answered affirmatively. An examination of the second prong of the *Norris* analysis produces the same result.

The second prong requires the offense charged be composed of a residuum of elements of a specified offense and asserted to be a violation of the general article. *Wright,* 5 M.J., at 111. Article 112a, U.C.M.J., as applicable in the instant case, has the following elements: first, distribution of a controlled substance; second, the distribution is wrongful. The article defines a controlled substance as:

> (1) Opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid, and marijuana and any compound or derivative of any such substance.
>
> (2) Any substance not specified in clause (1) that is listed on a schedule of controlled substances pre-

scribed by the President for the purposes of this article.

(3) Any other substance not specified in clause (1) or contained on a list prescribed by the President under clause (2) that is listed in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

Article 112a(b), U.C.M.J. Absent one of the enumerated substances, there is no offense because the substance is not controlled for purposes of the U.C.M.J. In contrast, 21 U.S.C. § 841 states it is unlawful for any person to knowingly or intentionally distribute a controlled substance. Unlike the requirements of 10 U.S.C. § 912a, however, 21 U.S.C. § 813 permits a "controlled substance analogue" to be treated as a controlled substance for the purposes of 21 U.S.C. § 841 by operation of law. Comparing these elements produces the realization that the establishment of what constitutes a controlled substance, for purposes of prosecution in a court-martial, has been eliminated. While arguably 21 U.S.C. § 841 has no express requirement that the distribution be wrongful, the *Reichenbach* court found this requirement satisfied under the facts of that case. *See*, 29 M.J., at 137. Thus, the elements of the two statutes are fairly similar. The distinction becomes evident, however, once the statutes are examined regarding what constitutes a controlled substance. The elimination of the requirements set forth above, as predicates to establishing controlled substances, vitiates the first element of an offense under Article 112a, U.C.M.J. The remaining portions of the elements, which would ostensibly establish an offense under 21 U.S.C. § 814, can be characterized no other way than as residuum. This conclusion, coupled with the manifest intent of Congress that misconduct involving controlled substances be prosecuted using the statutory vehi-

cle established for such offenses, dictates that Article 112a, U.C.M.J., preempted prosecution under Article 134.

The Court of Military Appeals decision in this case, finding prosecution for drug related offenses under Article 134 was not preempted, especially for the first time at their level, was clearly error and contrary to its own prior decisions. To hold otherwise in this case "grant[s] to the services unlimited authority to eliminate vital elements from . . . offenses expressly defined by Congress [as applicable to the military] and permit[s] the remaining elements to be punished as an offense under Article 134 [10 U.S.C. § 934]." *Norris,* 8 C.M.R., at 39.

II

21 U.S.C. § 813 which permits, by operation of law, a controlled substance analogue to be treated for purposes of establishing an offense under Title 21 of the United States Code, is unconstitutionally vague because it fails to provide a person of ordinary intelligence with constitutionally adequate notice of what conduct is prohibited. This vagueness denied petitioner the due process of law guaranteed by the Fifth Amendment to the United States Constitution.

Assuming, *arguendo,* Article 112a, U.C.M.J., does not preempt prosecution under Article 134 for conduct which contravenes 21 U.S.C. §§ 813 and 841, the conviction in this case cannot stand because the provisions of 21 U.S.C. § 813 are void for vagueness. As stated in the defense counsel's objection at trial, 21 U.S.C. § 813 fails to provide fair notice to people of ordinary intelligence concerning the conduct it proscribes. *Papachristou v. City of Jacksonville,* 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110, (1972); *Kolender v. Lawson,* 461 U.S. 352, 103 S.Ct. 1855,

75 L.Ed.2d 903 (1983). In *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222, 227-28 (1972), the Court set forth, in the portion pertinent here, an authoritative articulation of the vagueness doctrine, representing a synthesis of past teachings:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

The vagueness of the statute was deliberate. In considering the proposed law, the Senate Judiciary Committee stated:

> While the Committee realizes that this definition [of a controlled substance analogue] is, of necessity, general, the Committee is also convinced that it adequately describes the sort of drugs that the legislation seeks to bring under control. It would be impossible to list by their specific chemical structures all potential analogs that unscrupulous chemists might produce.

S.REP. NO. 99-196, 99th Cong., 1st Sess. 5 (1985) (App. Ex. XIII-20).

Petitioner takes exception that listing of analogues is impossible. The petitioner was tried on an Air Force installation located in Texas. The Texas Controlled Substances Act, Texas Revised Civil Statutes article 4476-15, § 2.03(d) shows that legislation can quite easily designate analogues (e.g. Pyrrolidine Analogue of Phencyclidine). Failure to include the known analogue in any listing fails to put a person on notice of the prohibited nature of a substance. Additionally and significantly, if it is impossible for authorities to know to list the substance it would be similarly impossible for a potential drug offender to know a substance is prohibited. The reality of addressing such permutations and the chemistry associated with it dictates a distinction be drawn between those who produce and those who "distribute" the substance, especially where the delivery is not for profit.

Those individuals who produce or create analogues of controlled substances must be sophisticated enough to understand the nature of their actions. This conclusion results from the sophisticated knowledge necessary to produce such a "controlled substance analogue." Under the definitional section, 21 U.S.C. § 802(32), a substance is an analogue if it is substantially similar to the chemical structure of a controlled substance listed in Schedule I or II of 21 U.S.C. § 812(c) and has an effect similar to or greater than a controlled substance listed in Schedule I or II of 21 U.S.C. § 812(c). An alternative definition of an analogue, where the substance has a "substantially similar chemical structure," makes any substance an analogue of a controlled substance "with respect to a particular person, which such person represents or intends to have a stimulant, depressant or hallucinogenic effect on the central nervous system that is substantially similar to or greater than . . . [the effect] . . . of a controlled substance in Schedule I or II." 21 U.S.C. § 802(32)(A)(iii). No such

knowledge or sophistication can be attributed to one who casually gives the substance to someone else.

Even if one were to have the specialized knowledge necessary to create a controlled substance analogue, there is no effective limit regarding what qualifies as a controlled substance analogue under the definition provided in 21 U.S.C. § 802(32)(A)(iii). It is this almost limitless possibility, combined with the molecular nature of analogue chemistry which renders the statute void and prevents "the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned, supra,* 92 S.Ct., at 2298.

That the knowledge necessary to identify a "substantially similar chemical structure" is beyond the knowledge of a person of ordinary intelligence, who did not create the substance, is substantiated in the legislative history. "The Committee concurs with the appraisal of the American Chemical Society that the term 'substantially similar' chemical structure is meaningful to scientists. . . ." H.R.Rep. No. 99-848, part 1, 99th Cong., 2d Sess. (1986). This situation clearly leads to the second concern in *Grayned.* Individual police, chemists, and jury members set the legal standard—not the law.

Knowledge of the chemical structure of a drug (or any other substance) is not generally known to the average airman or person of ordinary intelligence. Indeed, even the trial counsel could not figure out which drawing of chemical structures represented the analogue versus the controlled substance. The military judge had to request the expert witness go through his entire explanation a second time.

Because of the great difficulty of proving that the substances at issue are analogues, the Department of Justice precludes U.S. Attorneys from prosecuting under 21 U.S.C. § 813, at least at the time of the offenses here,

unless they first gain approval of the Assistant Attorney General of the Criminal Division. *Department of Justice Manual* § 9-100.205, at 9-1985.

Commentary on the new statute, while lauding its goals, finds the Controlled Substances Analogue Enforcement Act of 1986 "unnecessarily vague." J. Cameron, "Synthetic Drug Legislation: Broadening the Classifications by Defining Controlled Substances Analog as a Percentage of Common Structure Elements," 64 *U. Detroit L.Rev.* 775 (Summer 1987). Indeed, it is reported that Congress is now evaluating proposals to remedy the vagueness problems. Uelman and Haddox, *Drug Abuse and the Law Sourcebook* § 3.5 at 3-36 to 3-47 (Release No. 5, October 1988).

The goal to be achieved through the enactment of statutes such as 21 U.S.C. § 813 closely resembles the goal asserted by California in *Kolender v. Lawson, supra.* The State "stress[ed] the need for strengthening law enforcement tools to combat the epidemic of crime that plagues our Nation. The concern of our citizens with curbing criminal activity is certainly a matter requiring the attention of all branches of government." *Id.*, 103 S.Ct., at 1860. The Court concluded, "[a]s weighty as this concern is, however, it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity." *Id.* (citations omitted). The statute in the instant case suffers from the same flaw, however laudable its goal.

The flaw, as set forth above, is that the statute fails to provide constitutionally adequate notice of what conduct is prohibited. This conclusion is inescapable, notwithstanding the decision of the Court of Military Appeals in *Reichenbach. See, Reichenbach, supra,* at 132, n.5.

The conclusion in *Reichenbach* was predicated upon *United States v. Desurra,* 865 F.2d 651, *reh'g denied,* 868 F.2d 716 (5th Cir. 1989). The fallacy of both cases rests

upon the factual dissimilarity between the instant case and *United States v. Mazurie*, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975), that the *Desurra* court cited as authority for the standard regarding the presence of statutory vagueness.

The Mazuries were prosecuted for violating 18 U.S.C. § 1154, which prohibited the introduction of alcoholic spirits into "Indian country". "[T]he testimony at trial primarily dealt with whether the bar was within 'Indian country'." 95 S.Ct., at 713. In reversing the Court of Appeals and reinstating the Mazuries' conviction, the Court examined the testimony at trial regarding the area near Mazurie's bar. The *Mazurie* court concluded: "Given the nature of the [bar's] location and surrounding population the statute was sufficient to advise the Mazuries" that their bar was in a location addressed by the statute. 95 S.Ct., at 716. Furthermore, the distinction between the "Indians" and "non-Indians" was clear to Mazurie, as seen in his testimony at trial.[3] *Id.* Thus, the information necessary to inform a man of average intelligence regarding the nature of the prohibited conduct was obvious to the naked eye and to one who lived and dealt with the people on a daily basis. *Id.*, at n.10. To find the notice gathered in the factually distinctive and visually obvious scenario of *Mazurie* applicable to microscopic, highly technical and complex chemical substances in the instant case, stretches logic beyond recognition. The difference between that which is readily obvious to the naked eye and that which cannot be so observed, amounts to a difference that cannot be dealt with in degrees.

The judicial difficulties encountered by the scheduling of MDMA, according to the *Desurra* court "if anything,

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[3] "Mazurie testified that when there was trouble at his bar he would call the county sheriff to deal with a non-Indian, but would call the tribal police to deal with an Indian." *Mazurie*, 95 S.Ct., at 716, n.10.

gave the defendants additional notice that MDMA was an illicit drug." *Desurra,* 865 F.2d, at 653. The Court of Military Appeals, however, tended to view this judicial confusion in a different light. *See, Reichenbach,* 29 M.J., at 133-34. The only notice to be gathered from this judicial and administrative confusion was that the Drug Enforcement Administration tried to establish MDMA as an illegal controlled substance, but was unsuccessful. Reason dictates if an effort to make something illegal is unsuccessful, then the substance is not illegal. Thus, common sense would dictate that any notice to be gathered from the judicial proceedings was that MDMA, according to the decisions by the courts reviewing the cases, was not a controlled substance, at least not as charged. Thus, any notice given by the judicial system was contrary to that asserted by the *Desurra* court.

## CONCLUSION

In light of the preemption, by Article 112a, U.C.M.J., of prosecution for controlled substance related activities under Article 134, U.C.M.J., and, alternatively, the constitutionally inadequate notice provided by 21 U.S.C. § 813, rendering the statute void for vagueness, the Court of Military Appeals incorrectly interpreted the law as it applies to this case. This incorrect application denied the Petitioner due process of law. Accordingly, the Petitioner contends the case warrants further examination by this Court. Therefore, the Petitioner for Writ of Certiorari should be granted.

Respectfully submitted,

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NOVEMBER 1989

# APPENDICES

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

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ACM 26926

UNITED STATES

*v.*

SENIOR AIRMAN DAVID G. RAWLS, FR 249-45-3151
UNITED STATES AIR FORCE

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Sentence adjudged 17 March 1988 by GCM convened Bergstrom Air Force Base, Texas.
Military Judge: Harry G. Snyder (sitting alone).

Approved Sentence: Dishonorable discharge, confinement for fifteen (15) years, forfeiture of all pay and allowances and reduction to airman basic.

Appellate Counsel for the Appellant: Mr. John M. Economidy, Esquire, San Antonio, TX 78238-1601; Colonel Richard F. O'Hair and Captain William E. Boyle. Appellate Counsel for the United States: Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni and Major Jeffrey H. Curtis.

Before LEWIS, BLOMMERS and KASTL, Appellate Military Judges

**DECISION**

PER CURIAM:

Appealing his conviction for theft and use and transfer of numerous illegal substances, Senior Airman Rawls re-

news the claim made at his court-martial: He urges that government investigators violated his rights under Article 31, UCMJ, thereby invalidating both his inculpatory statements and his consent to various searches. These same contentions were before the military judge, sitting alone as a general court-martial. He decided them adversely to the accused in extremely detailed findings of fact. We find that nothing in the record warrants overturning his conclusions.

Upon review of the record of trial and comprehensive submissions of appellate counsel, we believe a recitation of the facts of the case would not prove useful. Suffice to say that we are convinced *United States v. Roa,* 24 M.J. 297 (C.M.A. 1987) is dispositive. The military judge's detailed findings of fact—based on the testimony of a Security Police investigator, Office of Special Investigations agent, and the appellant—are fully supported by the evidence. As *Roa* provides, it is permissible for law enforcement agents to continue to seek an accused's waiver of Fourth Amendment rights after he has invoked his right to counsel. *See also United States v. Stoecker,* 17 M.J. 158, 162 (C.M.A. 1984) and *United States v. Thompson,* 12 M.J. 993, 996 (A.F.C.M.R. 1982).

Attacking from another angle, the appellant argues that the investigators engaged in four odious and impermissible techniques which forced him to surrender his right to remain silent. More specifically, the appellant claims that his interrogators threatened to tell Rawls' mother about what he had done; counselled him that it was best for him to continue cooperating; cautioned him that the authorities had photographs and videotapes of him engaging in criminal conduct; and read him statements of others who had been contemporaneously implicated in drugs. These activities, Rawls claims, were designed to undermine his resistance and overwhelm his announced intention of seek-

ing a lawyer and remaining silent. The appellant's assertions are either directly contradicted or satisfactorily countered by testimony of the two investigators. They insisted that no one threatened to tell the appellant's mother what he had done. In regard to the remarks about "cooperation," Rawls had already begun to speak voluntarily and "was having trouble with names and dates." As the OSI agent testified, "we didn't know whether this was just poor memory or if he might have been playing games with us." Accordingly, Rawls was urged to continue his participation. As for the government agent supposedly enticing the appellant by claiming to possess pictorial proof of Rawls' wrongdoing, the testimony shows that he was already cooperating prior to any such questions. Finally, as for showing him the inculpatory statements of others, the OSI agent noted that Rawls was informed of statements from other people only *after* he had begun naming names. These statements were intended as memory joggers since: "his memory wasn't all that great. He had some problems with places and dates; therefore, we supported what he was trying to say to us with statements from other people to refresh his memory which is routine."

The military judge made detailed special findings. He concluded that questioning was reinitiated after Rawls expressed his desire to waive counsel and proceed to answer questions, "not due to any misconduct of the law enforcement officers." Upon our independent review of this contention and the submissions of appellate counsel, we too are convinced that the rights of the accused were not violated. *See generally United States v. Postle,* 20 M.J. 632, 637-640 (N.M.C.M.R. 1985). *United States v. Walker,* 624 F. Supp. 103 (D. Md. 1985) cited by appellant is inapposite factually since Mr. Walker did not reinitiate a conversation.

In a separate assignment of error, the appellant argues that he may not be held criminally liable under Article 112a for use and distribution of 3, 4-methylenedioxy methamphetamine, which is the designer drug "Ecstasy," also known as MDMA. The offenses were alleged from on or about 27 October 1986 to on or about 30 September 1987. For reasons developed at length in *United States v. Loftin,* ____ M.J. ____ (A.F.C.M.R. 1989) and *United States v. Tyhurst,* ____ M.J. ____ (A.F.C.M.R. 1989), we hold that Rawls' conviction may be upheld from on or about 13 November 1986 to on or about 18 September 1987. We uphold the conviction upon the basis that the accused's conduct is violative of Article 112a, UCMJ, since "Ecstasy" was listed as a Schedule I substance from fall of 1986 until 18 September 1987. Since the effective date of "Ecstasy" being listed under Schedule I was 13 November 1986, the initial date of the offense must be so amended. Moreover, the date on which a Federal court vacated the determination of the Administrator of the Drug Enforcement Agency that "Ecstasy" might be indexed on Schedule I was 18 September 1987. The closing date of the offense must be so amended. *See Grinspoon v. DEA,* 828 F.2d 881 (1st Cir. 1987).

Finally, the appellant argues that the approved sentence of a dishonorable discharge, confinement for 15 years, and accessory penalties is inappropriate. The defense argues that the appellant worked hard under difficult military conditions, that he was a naive and unsophisticated "country boy," and that the sentence is disproportionate because "major drug traffickers in South Texas who bring in drugs by the boat load or on 18-wheel trailers are getting sentences of around 15 years," and Senior Airman Rawls was "not in their league." Despite these arguments, we find the sentence, as approved by the convening authority, appropriate. Time after time, the appel-

lant used marijuana, cocaine, methamphetamine, lysergic acid diethylamide, and the analog substance "Ecstasy." He distributed drugs and sold them for a profit. He sold to several high school students out of his apartment. Even after being initially apprehended, he continued to use drugs. His drug involvement began at least in January 1986 and extended to September 1987. He stole government property from the barracks to furnish his apartment. Upon these facts, we find the sentence entirely appropriate.

Only so much of specification 2 of the Additional Charge is approved as finds that the accused did, on divers occasions between on or about 13 November 1986 and on or about 18 September 1987 wrongfully use a substance known as "Ecstasy," a Schedule I controlled substance, under Title 21, United States Code, a violation of Article 112a, UCMJ.

Only so much of specification 7 of the Additional Charge is approved as finds that the accused did, on divers occasions between on or about 13 November 1986 and on or about 18 September 1987 wrongfully distribute a substance known as "Ecstasy," a Schedule I controlled substance, under Title 21, United States Code, a violation of Article 112a, UCMJ.

The findings of guilty, as modified, and the sentence are correct in law and fact and, on the basis of entire record, are

AFFIRMED.

BLOMMERS, Judge:

I concur in the result. As for the designer drugs issue, see my separate opinion in *United States v. Tyhurst*, ____ M.J. ____ (A.F.C.M.R. 1989).

[SEAL]

OFFICIAL:

/s/ Mary V. Fillman
MARY V. FILLMAN
Captain, USAF
Chief Commissioner

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 62342/AF
CMR Dkt. No. 26926

UNITED STATES, APPELLEE

*v.*

DAVID G. RAWLS, (249-45-3151), APPELLANT

**ORDER**

On further consideration of the granted issue (28 MJ 449) in light of *United States v. Reichenbach,* No. 61,504/AF, ____ MJ ____ (CMA September 25, 1989), we conclude that specification 2 of the Additional Charge (wrongful use of ECSTASY) does not state an offense under the Uniform Code of Military Justice. However, in light of the fact that the Government established that ECSTASY was a controlled substance analogue and the lack of any evidence that appellant was misled as to the nature of the substance he was distributing, we hold that specification 7 of the Additional Charge (wrongful distribution of ECSTASY) does properly allege a violation of Article 112a, UCMJ, 10 USC § 912a. In light of the other, more serious offenses of which appellant stands convicted, we are satisfied that appellant's conviction for wrongful use of ECSTASY played no appreciable role in the sentence of the military judge in this case. *Cf. United States v. Thompson,* 22 USCMA 88, 91, 46 CMR 88, 91 (1972); *see also United States v. Fox,* 10 MJ 176 (CMA 1981). Accordingly, it is by the Court, this 29th day of September, 1989

ORDERED:

That the decision of the United States Air Force Court of Military Review is reversed as to specification 2 of the Additional Charge; the finding of guilty as to that specification is set aside and that specification is dismissed. Specification 7 of the Additional Charge is changed from a violation of Article 112a to a violation of Article 134. In all other respects the decision below is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (ECONOMIDY, Esq.)
Appellate Government Counsel (DAVIS)

U.S. COURT OF MILITARY APPEALS

No. 61504/AF
ACM 26857

UNITED STATES, APPELLEE

*v.*

BRIAN F. REICHENBACH, AIRMAN,
U.S. AIR FORCE, APPELLANT

Sept. 25, 1989

Accused, an airman, United States Air Force, was convicted in general court-martial, Bergstrom Air Force Base, Texas, Peter N. Rogers, J., of drug charges on his conditional pleas of guilty, and he appealed. The Court of Military Review affirmed, and review was granted. The United States Court of Military Appeals, Everett, C.J., held that: (1) after listing of ECSTASY in schedule I as a "controlled substance," offenses involving ECSTASY were to be prosecuted under article of uniform code governing drug offenses, and (2) allegation of "wrongful use" of controlled substance could not be construed to allege "possession," so as to uphold specification.

Affirmed in part and reversed in part.

Cox, J., concurred in result and filed opinion.

For appellant: *Captain William E. Boyle* (argued); *Colonel Richard F. O'Hair* (on brief).

For appellee: *Major Kathryn I. Taylor* (argued); *Colonel Joe R. Lamport* and *Lieutenant Colonel Robert E. Giovagnoni* (on brief).

**OPINION OF THE COURT**

EVERETT, Chief Judge:

A military judge sitting alone as a general court-martial a Bergstrom Air Force Base Texas, tried appellant on two charges alleging drug offenses, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. Reichenbach pleaded guilty to the original Charge, which alleged wrongful use of marijuana, cocaine, and lysergic acid diethylamide (LSD), and wrongful distribution of cocaine. The second Charge—pleaded as an Additional Charge—alleged in specification 1 that "on divers occasions, between on or about 1 February 1987 and 19 September 1987," appellant wrongfully used "a controlled substance analogue, known as ECSTASY, treated as a Schedule I controlled substance under Title 21 United States Code, section 813, to wit: an analogue of 3, 4 methylenedioxy amphetamine." Specification 2, in similar language, alleged wrongful distribution of ECSTASY "between on or about 1 February 1987 and 23 September 1987." A third specification alleged wrongful distribution of LSD.

After moving unsuccessfully to dismiss the first two specifications of the Additional Charge on the ground that they did not plead an offense, Reichenbach entered conditional pleas of guilty. Thereupon, the convening authority withdrew the LSD specification and deleted from the second specification an allegation that the distributions occurred on "divers occasions." The military judge entered findings pursuant to the pleas of guilty and sentenced Reichenbach to a bad-conduct discharge, confinement for 17 months, total forfeitures and reduction to the grade of airman basic. The convening authority approved the sentence; and the Court of Military Review affirmed in a short-form opinion. We granted review to determine

whether appellant's use and distribution of ECSTASY were offenses under Article 112.[1]

I

A

We have discussed the status of drug offenses in the military as follows:

> The Uniform Code [as of 1982] contain[ed] no express prohibition of drug abuse; . . .
>
> Prosecution of drug offenses has been handled in these three ways: (1) Under the first two clauses of Article 134, [UCMJ, 10 USC § 934,] proscribing "disorders and neglects to the prejudice of good order and discipline in the armed forces" or "conduct of a nature to bring discredit upon the armed forces"; (2) under the third clause of Article 134, which prohibits "crimes and offenses not capital" and, in effect, incorporates other penal provisions of the United States Code; and (3) under Article 92, [UCMJ, 10 USC § 892,] as a violation of various service regulations concerning drug abuse.

*United States v. Ettleson,* 13 MJ 348, 358 (CMA 1982) (footnote and citation omitted).

To simplify and facilitate the prosecution of drug offenses,[2] Congress in 1983 added to the Code Article 112a, which provides:

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[1] The granted issue was:

WHETHER MDMA (3, 4 METHYLENEDIOXY METHAMPHETAMINE) WAS NOT PLACED INTO SCHEDULE 1 (21 USC § 812) BY 21 USC § 813 THEREBY FAILING TO MAKE APPELLANT'S USE AND DISTRIBUTION AN OFFENSE UNDER ARTICLE 112A, UCMJ.

[2] As stated in the Senate Report on Article 112a:

Although drug abuse is one of the most serious disciplinary problems facing the armed forces, there is no specific section of the

(a) Any person subject to this chapter who wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the United States, exports from the United States, or introduces into an installation, vessel, vehicle, or aircraft used by or under the control of the armed forces a substance described in subsection (b) shall be punished as a court-martial may direct.

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UCMJ concerning illegal drugs. Prosecution of drug offenses under Article 133 (conduct unbecoming an officer and a gentleman), Article 134 (e.g., crimes that are prejudicial to good order and discipline, service discrediting) or Article 92 (violations of lawful orders) are cumbersome, and have led to litigation about compliance with the technical requirements of those Articles and implementing provisions. *See, e.g., United States v. Ettleson,* 13 M.J. 348 (C.M.A.1982); *United States v. Thurman,* 7 M.J. 26 (C.M.A.1979); *United States v. Gui[l]bault,* 6 M.J. 20 (C.M.A.1978).

Although prosecutions under Articles 92, 133 and 134 are appropriate, Congress traditionally has set forth the details of significant offenses in the text of the UCMJ. There is a detailed statutory scheme for addressing drug offenses in the civilian sector under title 21, United States Code. In view of the substantial dangers to morale and readiness created by drug abuse in the armed forces, and the continuing litigation in this area, it is essential that Congress provides a specific article on controlled substances in the UCMJ.

The new Article follows the tradition of the UCMJ by setting forth the specific offenses. The maximum punishments will be established by the President in the Manual for Courts-Martial under Article 56. The article sets forth some of the more frequently abused substances, such as marijuana, cocaine, heroin, and LSD and incorporates the controlled substances listed by the Attorney General under title 21, as well as any controlled substances listed by the President in the Manual for Courts-Martial.

S.Rep. No. 53, 98th Cong., 1st Sess. 29 (1983);*see* H.R.Rep. No. 549, 98th Cong., 1st Sess. 17 (1983), *reprinted in* 1983 U.S. CODE CONG. & ADMIN. NEWS 2177, 2182.

(b) The substances referred to in subsection (a) are the following:

(1) Opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid, and marijuana and any compound or derivative of any such substance.

(2) Any substance not specified in clause (1) that is listed on a schedule of controlled substances perscribed by the President for the purposes of this article.

(3) Any other substance not specified in clause (1) or contained on a list prescribed by the President under clause (2) that is listed in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

The Controlled Substances Act referred to in Article 112a(b)(3) was enacted by Congress in 1970 as the Comprehensive Drug Abuse Prevention and Control Act, Pub.L. No. 91-513, Title II § 101 et seq., 84 Stat. 1236, 1242 (1970).[3] Among other things, this Act authorized the Attorney General—after providing the "opportunity for a hearing pursuant to the rule-making procedures prescribed by" the Administrative Procedure Act, *see* 21 USC § 811(a)—to establish "five schedules of controlled substances, to be known as schedules I, II, III, IV and V," *see* 21 USC § 812.

Findings are required for each of the schedules. *See* 21 USC § 812(b). For example, to be placed in schedule I, there must be these findings:

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[3] At about the same time the National Conference of Commissioners on Uniform Laws promulgated a Uniform Controlled Substances Act, which followed generally the Federal legislation and was the model for state laws on controlled substances.

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of drug or other substance under medical supervision.

For schedule II, the required findings are:

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

Schedules III, IV, and V require findings that the drug or other substance has less potential for abuse than the drugs or other substances in schedules I and II; that it has "a currently accepted medical use in treatment in the United States"; and that it tends to lead to less physical and psychological dependence than is true of the drugs and substances in the lower-numbered schedules.

When Congress originally enacted the Controlled Substances Act, it listed a variety of substances under the five schedules. For example, the list under schedule I included heroin, marijuana, and lysergic acid diethylamide. In subsequent years, the Attorney General has added controlled substances to the schedules pursuant to the authority delegated under 21 USC § 811.

Unfortunately, because of the ingenuity of drug dealers and underground chemists, hazardous substances have been placed in circulation which were not listed on the five schedules; and a substantial quantity of a new drug might

be distributed before the Attorney General could comply with the procedures which 21 USC § 811(a) required for adding substances to the schedules. As Congress recognized:

> Confined by Federal drug legislation that ties unlawful conduct to precise chemical definitions, law enforcement authorities have long found themselves at least one step behind drug dealers who possess certain rudimentary scientific abilities. Thus in the 1960's certain mescaline derivates created problems until controlled under the Drug Abuse Control Amendments and their successor legislation, the Controlled Substances Act (CSA). In the 1970's, various analogs of PCP and methaqualone flourished until eventually brought within the exact definitions of the act. Again in the 1980's the drug laws have been circumvented by profiteers capable of making minor alterations in the molecular structure of a controlled substance. Recent analogs have been based largely on the substances meperidine and fentanyl, from which models an almost infinite number of imitations can be derived. For example, the American Chemical Society notes:
>
> > Fentanyl is not a simple molecule, and it turns out that a vast number of relatively minor modifications of its molecular structure result in compounds that also act as potent narcotics—in some cases, many times as potent as fentanyl. Tinker with a side chain here, add a halogen there, and the result is still probably a chemical that packs a powerful wallop, a chemical that can be sold on the street as heroin, and a chemical that might very well be as legal as sugar.

S.Rep. No.196, 99th Cong., 1st Sess. 1 (1985).[4]

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[4] As Senator Chiles of Florida noted in testimony before the Subcommittee on Crime of the House Judiciary Committee, many designer

As was also understood by Congress:

> The Federal Food, Drug, and Cosmetic Act [21 U.S.C. 301, *et seq.*] is also inadequate to combat the analog problem. 21 U.S.C. 355(a) makes it unlawful to introduce a "new drug" into interstate commerce until certain conditions have been met; this statute, however, is not aimed primarily at the distribution of illicit, addictive drugs patterned after schedule I and II compounds, and therefore carries penalties much lighter than those imposed by the Controlled Substances Act. Concerned more with proper testing and labeling of drugs having arguably beneficial effects than with drugs sold solely for illicit purposes, the Food, Drug, and Cosmetic Act is also inapplicable to the analog problem in that the Food and Drug Administration is not properly equipped to investigate or pursue analog traffickers.

Report, *supra* at 2.

To help close this loophole, Congress in 1984 authorized temporary scheduling: "If the Attorney General finds that the scheduling of a substance in schedule I on a temporary basis is necessary to avoid an imminent hazard to the public safety, he may, by order and without regard to" various procedural requirements, "schedule such substance in schedule I if the substance is not listed in any other schedule." 21 USC § 811(h)(1). This legislation did not provide a complete solution because

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drugs are more dangerous than the parent drugs. "Designer drugs such as the fentanyl analogues have resulted in over one hundred drug overdoses because in some cases they are as much as 3,000 times more potent than heroin." H.R.Rep. No. 848, 99th Cong., 2d Sess. 4 (1986). According to the same witness, one designer drug, MPPP, had been marketed with processing impurities; and the resulting drug, MPTP, had left dozens of users totally paralyzed and had placed at least 400 persons at serious risk of Parkinsonism. *Id.* at 4.

> [t]he emergency scheduling procedure, however, is entirely reactive and can only operate after a controlled substance analog has already been shown to pose a severe risk to the public health. The legal and scientific analysis required to pinpoint first the existence, composition,and circulation of a substance, and then to document its devastating effect, takes time (and, indeed, the emergency scheduling procedures themselves contain an automatic 30-day lag period.) Until that usually lengthy process has been completed and the substance is formally proscribed, traffickers in the drug are immune to the penalties of the Controlled Substances Act. Even after the substance has finally been scheduled, of course, another minor alteration in its structure begins the entire process afresh.

Report, *supra* at 2. Another defect is that the temporary scheduling expired after one year. *see* 21 USC § 811(h)(2).

[1] As an additional remedy, Congress amended the Controlled Substances Act in 1986 to encompass "controlled substance analogue[s]." According to the definition added as subsection (32) to 21 USC § 802, such an analogue is a substance[5]

> (i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;

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[5] It has been contended that the definition of "controlled substance analogue" in 21 USC § 802 is vague and that a conviction based on this definition cannot properly be sustained. In our view, however, the definition is specific enough to give constitutionally adequate notice of the misconduct prohibited. *United States v. Desurra,* 865 F.2d 651 (5th Cir.1989); *see Boos v. Barry,* 108 S.Ct. 1157, 1169 (1988). In the definition, the spelling "analogue" is used, while on other occasions – such as in the title of the Act – the spelling is "analog." Either spelling is permissible, although "analogue" is probably preferred.

(ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or

(iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

(B) Such term does not include–

(i) a controlled substance;

(ii) any substance for which there is an approved new drug application;

(iii) with respect to a particular person any substance, if an exemption is in effect for investigational use, for that person, under section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355)[21 U.S.C.A. § 355] to the extent conduct with respect to such substance is pursuant to such exemption; or

(iv) any substance to the extent not intended for human comsumption before such an exemption takes effect with respect to that substance.

The Controlled Substance Analogs Enforcement Act of 1986 also provided: "A controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of this title and title III as a controlled substance in schedule I." Pub.L. No. 99-570, Title I, § 1202, 100 Stat. 3207-13 (1986), codified as 21 USC § 813 now reads, after the word "treated,"–"*for the pur-*

*poses of any Federal law* as a controlled substance in schedule I." Pub.L. No. 100-690, Title VI, § 6470(c), 102 Stat. 4378, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 4378 (emphasis added).

**B**

In the summer of 1984, the Administrator of the Drug Enforcement Administration (DEA), acting under authority delegated by the Attorney General, issued a notice of proposed scheduling of MDMA—popularly known as ECSTASY—pursuant to 21 USC § 811(a). *See* Note, *The Emergence and Emergency of Designer Drugs: Subdelegation of the Power Temporarily to Schedule in Light of United States v. Spain,* 14 Am.J.Crim.Law 257, 264 (1988). "Sixteen interested parties responded to the proposed notice of rule making; seven of those requested a hearing." *Id.* at 265 (footnote omitted). After a subsequent hearing, an administrative law judge ruled in May 1986 that MDMA should be placed in schedule III. Meanwhile, the Administrator of DEA temporarily placed MDMA on schedule I. *See* 51 Fed. Reg. 36,552 (1986); 14 Am.J.Crim.Law at 267. The legal situation that resulted has been summarized in this manner:

> [P]ersons committing offenses involving MDMA occurring between July 1, 1985, and November 13, 1986, were subject to prosecution based upon MDMA's *temporary* placement in Schedule I pursuant to 21 U.S.C. 811 and 812. Finally, but for the fact that MDMA had already been made a controlled substance, persons committing MDMA offenses on or after October 27, 1986, would have been subject to prosecution under the Controlled Substances Analogue Enforcement Act.

*See* Harbin, *MDMA*, 2 Narcotics, Forfeiture, and Money Laundering Update (No. 1), Dept. of Justice, Criminal Division at 14 and 16 (Winter 1988).

The situation was further complicated by legal rulings which invalidated the scheduling by the Administrator. First, in *United States v. Spain*, 825 F.2d 1426 (10th Cir. 1987), the Court of Appeals ruled that the Attorney General had improperly subdelegated his temporary scheduling authority to the Administrator of DEA and had failed to give the required statutory notice of the scheduling order. Therefore, the temporary scheduling of MDMA on July 1, 1985, had been invalid; and prosecutions and convictions could not be based thereon. *Accord United States v. Caudle*, 828 F.2d 1111 (5th Cir. 1987). *See also* 14 Am.J.Crim.Law at 268; Harbin, *supra* at 16-18.

The permanent placement of MDMA on schedule I, which took effect on November 13, 1986, was also challenged successfully in *Grinspoon, M.D. v. Drug Enforcement Administration*, 828 F.2d 881 (1st Cir. 1987). In this instance, the Court of Appeals held that the Administrator had erred in his application of two of the statutory standards for placing a drug in schedule I. Therefore, his scheduling order was remanded to the Administrator for further proceedings.

On remand, the Administrator again concluded that MDMA should be permanently placed in schedule I effective March 23, 1988. Accordingly, since that date, prosecutions for offenses involving MDMA may be maintained on the basis of the listing in schedule I. With respect to the situation prior to that time, a Department of Justice attorney has expressed this view:

> The effect of the *Spain*, *Caudle*, and *Grinspoon* decisions is to invalidate both the temporary and permanent placement of MDMA in Schedule I with the result that convictions for offenses involving MDMA

based upon its temporary placement in Schedule I are subject to reversal in the Fifth and Tenth Circuits and convictions for offenses involving MDMA based upon its temporary placement in Schedule I are subject to reversal in the First Circuit. As a practical matter, however, it appears that all federal prosecutions based upon MDMA's previous status as a Schedule I controlled substance will be subject to challenge and that such challenges are likely to be sustained.

Unfortunately, there appears to be no alternative legal basis under federal law for reindicting MDMA offenders, except perhaps MDMA manufacturers, for offenses completed prior to *October 27, 1986.* MDMA manufacturers may be subject to reindictment under the misdemeanor "misbranding" provisions of the Food, Drug and Cosmetic Act, 21 U.S.C. 331 (k) and 333(a). Prosecutors should be alert, however, to the possibility that manufacturers and other MDMA offenders whose offenses predate October 27, 1986, may be subject to felony or misdemeanor prosecution under applicable state law.

Persons trafficking in or possessing MDMA *on or after October 27, 1986,* through March 22, 1988, may be prosecuted under the Controlled Substances Analogue Enforcement Act (codified at 21 U.S.C. 802(32) and 813). MDMA is a well-known analogue of the schedule I controlled substance MDA. Although the Analogue Act expressly exempts controlled substances from its coverage, prosecutors proceeding to prosecute MDMA offenses under the Analogue Act should argue that the effect of the *Spain, Caudle,* and *Grinspoon* decisions was to completely invalidate

> MDMA's status as a controlled substance, thereby rendering MDMA offenses suitable for prosecution under the Act.

Harbin, *supra* at 18-19.

C

Reichenbach had used and distributed MDMA—ECSTASY—in 1987 when it was not properly listed, either temporarily or permanently, on any schedule under the Controlled Substances Act. *See* Art. 112a(b)(3). Moreover, the drug had not been listed on any schedule prescribed by the President for the purposes of Article 112a(b)(2). In order to prosecute appellant, the Government sought to invoke the Controlled Substance Analogs Enforcement Act and to claim that, by operation of 21 USC § 813, ECSTASY became "a controlled substance on schedule I" within the meaning of Article 112a(b)(3).

[2] One difficulty with this argument is that it does not conform to the statutory language. Article 112a(b)(3) encompasses any substance "that is *listed* in schedules I through V of section 202 of the Controlled Substances Act." (Emphasis added.) Although 21 USC § 813 states that a controlled substance analogue shall "be treated" as a controlled substance in schedule I, this does not constitute a "listing" of the analogue. In fact, according to the definition contained in 21 USC § 802(32)(B), the term "controlled substance analogue" "does *not* include—a controlled substance." (Emphasis added.) Thus, by the very language of the statute, because MDMA is a "controlled substance analogue," it is *not* one of the substances encompassed by Article 112a(b)(3).

A further difficulty with the Government's argument is that the definition of "controlled substance analogue" in 21 USC § 802(32)(A) originally was enacted for use in con-

nection with the Controlled Substances Act and the Controlled Substances Export and Import Act, rather than with the Uniform Code of Military Justice. According to the language of 21 USC § 813—as it existed in 1987, when appellant's alleged offenses were committed—a "controlled substance analogue" was to be treated "as a controlled substance in schedule I" for purposes of Title 21; and no reference was made to any other part of the United States Code. Not until 1988 was section 813 amended to provide that an analogue would be treated as a schedule I controlled substance "for the pruposes of *any* Federal law." (Emphasis added.)

The Government contends that the 1988 amendment to 21 USC § 813 simply clarified the original legislative intent. However, it appears to be more in the nature of remedial legislation to correct earlier omissions—such as the failure of Congress to amend Article 112a of the Uniform Code to deal with "controlled substances analogues." In this connection, these observations by Senior Judge Kastl in *United States v. Tyhurst*, 28 MJ 671, 674-75 (AFCMR), *certified*, 28 MJ 268 (1989), *cross-pet. denied*, ____ MJ ____ (Aug. 30, 1989), are persuasive:

> We find nothing in legislative history or intent to support the Government's proposition that analog drugs are covered by Article 112a. The Controlled Substance Analogs Enforcement Act, 21 U.S.C. § 813 was enacted in 1986, two years after the 1984 Manual for Courts-Martial. No subsequent action incorporated Section 813 within Article 112a. Moreover, the language of 21 U.S.C. 813 appears self-limiting: it requires the analog to be treated as a Schedule I controlled substance for purposes of "this title and Title III." "This title" and "Title III" refer to overall Federal drug supervision within 21 U.S.C.

> There appears to be no other specific legislative history to reveal how 21 U.S.C. § 813 was to interact with other sections of 21 U.S.C. or the UCMJ. We believe it strains logic to impute such a legislative intention when nothing suggests that 21 U.S.C. 813 was to be assimilated by the armed forces. Without some evidence, we refuse to read Article 112a as some type of military law PACMAN, designed to absorb every new drug law passed by Congress or ban every new drug mischief.

Although in November 1988 Congress amended 21 USC § 813 to treat analogues like controlled substances "for the purposes of any Federal law," this amendment still does not constitute a "listing" in schedule I, and it does not change the definition in 21 USC § 802(32), whereunder the terms "controlled substance" and "controlled substance analogue" are mutually exclusive. However, we need not dwell on this point, because effective March 23, 1988, MDMA has been listed in schedule I as a "controlled substance analogue"; and so offenses involving the drug can be prosecuted under Article 112a(b)(3) of the Uniform Code.

**D**

The Government now contends that distribution and use of ECSTASY can be prosecuted under Art. 112a(b)(1) because this substance is a "derivative" of "methamphetamine"—a substance specifically listed in (b)(1). In this connection, we note that at trial the Government never purported to proceed on this theory; and the evidence was not directed thereto.

In *Tyhurst,* Senior Judge Kastl had this comment on a government contention that a designer drug closely related to ECSTASY was a "derivative" or "compound" of a substance listed in Article 112a(b)(1):

> Less obvious, perhaps is the fact that the Government has failed to carry its burden of proof that N-hydroxy MDA is either a "derivative" or a "compound" as defined in Article 112a. We are hampered by the fact that the record of trial did not develop workable definitions of these words and by the further fact that we have little expertise in chemistry. As best we can understand it, a "derivative" traditionally is the same basic drug appearing in a different form yet having the same molecular structure as its parent drug. *See* Steadman's Medical Dictionary 336 (22d Ed. 1972). A "compound" is a preparation containing several ingredients. *Id.* at 276. Even the broadest definition of "derivative" drug—in a civil rather than a criminal case—requires that the copycat *be prepared from that parent drug. See Reckitt & Coleman, Ltd. v. Drug Enforcement Administration,* 788 F.2d 22, 24 (D.C.Cir. 1986). As we understand it, N-hydroxy MDA is not prepared from its parent drug. Therefore, we cannot agree with our concurring brother that the offense might currently be punishable under Article 112a. Furthermore, if analogs are already covered as "derivatives" of outlawed drugs, there would have been no need to revisit a half century of classifying drugs by their precise molecular structure and take a new approach in the Analog Act in 1986.

28 MJ at 675.

[3] Similarly, we concluded that, in appellant's trial, the evidence of record was inadequate to prove beyond a reasonable doubt that ECSTASY was a "derivative" of a drug listed in Article 112a(b)(1).

E

> Under 21 USC § 841, it is unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]

By reason of 21 USC § 813, a "controlled substance analogue"—like ECSTASY— may be treated as "a controlled substance" for purposes of 21 USC § 841.

During oral argument, we asked both counsel whether Reichenbach's distribution and use of ECSTASY could be prosecuted under the Uniform Code of Military Justice on the theory that 21 USC § 841—as modified by 21 USC §813—proscribed "crimes and offenses not capital" within the meaning of the third clause of Article 134. Both appellate government counsel and appellate defense counsel seemed concerned that incorporating § 841 in this way might violate the doctrine of preemption.

This Court first recognized that doctrine in *United States v. Norris,* 2 USCMA 236, 8 CMR 36 (1953), which held that Article 121, prohibiting larceny and wrongful appropriation, preempted any prosecution under Article 134 for wrongful taking. Since *Norris,* we have applied the preemption doctrine on various occasions. For example, in *United States v. Irvin,* 21 MJ 184, 187-89 (CMA), *on remand,* 22 MJ 559 (AFCMR), *aff'd in part, dismissed in part,* 22MJ 342 (CMA), *cert. denied,* 479 U.S. 852, 107 S.Ct. 183, 93 L.Ed.2d 117 (1986), we held that the doctrine of preemption precluded use of the Assimilative Crimes Act—as incorporated by Article 134—to punish an accused servicemember for misconduct which was the subject of a specific punitive article in the Uniform Code.

On the other hand, in *United States v. Wright,* 5 MJ 106 (CMA 1978), the Court ruled that the Uniform Code did

not entirely preempt the Assimilative Crimes Act. Moreover, *United States v. Kick,* 7 MJ 82 (CMA 1979), held that, even though the Code contains punitive articles proscribing murder and manslaughter, the crime of negligent homicide could nonetheless be prosecuted under Article 134.

[4] As we understand these decisions, the rationale of preemption is that, if Congress has covered a particular kind of misconduct in specific punitive articles of the Uniform Code, it does not intend for such misconduct to be prosecuted under the general provisions of Article 133 or 134. In light of legislative history of Article 112a—to which we have already adverted—enactment of that Article precludes prosecution under the first two clauses of Article 134, which concern service-discrediting conduct and conduct prejudicial to good order.[6]

We come to a different conclusion with respect to prosecutions based on third clause of Article 134. As we construe the legislative intent manifested in ARticle 112a, Congress was well aware of the threat that drug use poses to the military mission;[7] and it wished to facilitate and simplify drug prosecutions. That goal is quite consistent with the purpose of the third clause of Article 134—namely, to allow military authorities to prosecute misconduct that could be the basis for criminal prosecution in a federal district court. We conclude, therefore, that enactment of Article 112a did not preempt prosecutions under

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[6] Prosecution in this manner was common prior to the enactment of Article 112a (*see United States v. Etleson,* 13 MJ 348, 358 (CMA 1982)); and Article 112a was intended to eliminate the occasion for such prosecutions.

[7] *See* n. 2, *supra; cf. Murray v. Haldeman,* 16 MJ 74 (CMA 1983); *United States v. Trottier,* 9 MJ 337 (1980).

Article 134 for drug-related misconduct which violated Title 21 of the United States Code.[8]

[5] In such prosecutions, the criminal liability of the servicemember is the same as if he were being prosecuted in a federal district court. However, with respect to distribution of MDMA after the drug was properly placed on schedule I in March 1988, a prosecution under Article 134 could not be maintained. According to the statutory definition, a "controlled substance" is not a "controlled substance analogue." 21 USC § 802(32)(B). Therefore, 21 USC § 813 would no longer apply to MDMA after it had been properly scheduled; instead offenses involving ECSTASY would then be prosecuted under Article 112a.

[6] When construed with 21 USC § 813, section 841 provides that it shall be unlawful "for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense," a controlled substance analogue. Accordingly, a servicemember could be prosecuted under 21 USC § 841, as incorporated in Article 134 of the Uniform Code, for knowing or intentional distribution of ECSTASY prior to March 1988, when MDMA was properly placed on Schedule I by the Administrator of DEA.

Under 21 USC § 841, the Government was required to establish that Reichenbach's distribution of ECSTASY was "knowing" or "intentional." The second specification in Additional Charge alleges "wrongful" distribution; and, for some purposes, this Court has construed wrongfulness to include a requirement of "knowledge." *Cf. United*

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[8] According to the Senate Report on Article 112a, "This amendment [adding Art. 112a] is intended to apply solely to offenses within its express terms. It does not preempt prosecution of drug paraphernalia offenses or other drug-related offenses under Article 92, 133, or 134 of the UCMJ." S.Rep. No. 53, *supra* (n. 2) at 29.

*States v. Mance,* 26 MJ 244 (CMA), *cert. denied,* ____ U.S. ____, 109 S.Ct. 367, 102 L.Ed.2d 356 (1988). Moreover, when guilty pleas are involved, we have generally upheld the sufficiency of a specification, if the essential averments were reasonably included within the language of the specification. *See, e.g., United States v. Brecheen,* 27 MJ 67 (CMA 1988); *United States v. Watkins,* 21 MJ 208 (CMA 1986).

In the present case, appellant was not claiming that his distribution of ECSTASY was without his knowledge of the nature of the drug involved. Instead, he was contending that this particular drug was not subject to prosecution in a court-martial. Furthermore, the providence inquiry made it clear that the distribution was "knowing and intentional."[9] Under these circumstances, we consider that the findings of guilty as to the specification of wrongful distribution of ECSTASY should be treated as a conviction under Article 134—rather than under Article 112a—and that the maximum confinement imposable is dictated by 21 USC § 841.

[7] The "use" of controlled substances is not prohibited by 21 USC § 841; but possession of a controlled substance is punishable under 21 USC § 844. In light of 21 USC § 813, we conclude that, until MDMA was permanently scheduled effective March 1988, possession of this drug was punishable because it was a controlled substance analogue.

[8] In interpreting the Uniform Code, we sometimes have treated "possession" of a drug as included within its

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[9] If the plea of guilty had been unconditional, the findings of guilty of wrongful distribution, in violation of Article 112a, might be sustained on the rationale of *United States v. Felty,* 12 MJ 438 (CMA 1982).

"use." Thus, it could be argued that the specification alleging Reichenbach's "use" of ECSTASY should be construed to allege "possession." However, in civilian jurisprudence, "use" has generally been considered separable from possession; and there is precedent that proof of "use" (*e.g.*, presence of the drug in the bloodstream) does not establish "possession."[10] Under these circumstances, we

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[10] *See, e.g., Minnesota v. Lewis,* 394 N.W.2d 212 (Minn.1986); *Kansas v. Flinchpaugh,* 232 Kan, 831, 659 P.2d 208 (1983); *Oregon v. Downes,* 31 Or.App. 1183, 572 P.2d 1328 (1977); *Washington v. Reid,* 66 Wash.2d 243, 401 P.2d 988 (1965). A typical rationale for this conclusion was stated by the Kansas Supreme Court:

> Once a controlled substance is within a person's system, the power of the person to control, possess, use, dispose of, or cause harm is at an end. The drug is assimilated by the body. The ability to control the drug is beyond human capabilities. The essential element of control is absent. Evidence of a controlled substance after it is assimilated in a person's blood does not establish possession or control of that substance. The Court of Special Appeals of Maryland has agreed:
>
> "Once a narcotic drug is injected into the vein, or swallowed orally, we think it apparent that it is no longer within 'one's control' or held at 'one's disposal.' And it would likewise be beyond the taker's ability to exercise any restraining or directing influence over it. Consequently, once the drug is ingested and assimilated into the taker's bodily system, it is no longer within his control and/or possession in the sense contemplated by Section 277." *Franklin v. State,* 8 Md.App. 134, 138, 258 A.2d 767 (1969), cert. denied 257 Md. 733 (1970).
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> * * * * *
>
> Discovery of a drug in a person's blood is circumstantial evidence tending to prove prior possession of the drug, but it is not sufficient evidence to establish guilt beyond a reasonable doubt. The absence of proof to evince knowledgeable possession is the key.

659 P.2d at 211, 212. We are unaware of any Federal prosecution in which "use" has been equated with "possession."

are reluctant to construe the allegation in the same way that we would treat an allegation of "wrongful use" under Article 112a. Accordingly, we conclude that specification 1 of the Additional Charge, alleging wrongful use, should be dismissed. We are, however, convinced that this error did not increase the sentence.

II

The decision of the United States Air Force Court of Military Review is reversed as to specification 1 of the Additional Charge. The finding of guilty thereon is set aside and that specification is dismissed. The Additional Charge is modified by substituting Article 134 for Article 112a as the Article violated. In all other respects, the decision below is affirmed.

Judge SULLIVAN concurs.

COX, Judge (concurring in the result):

Although I recognize that one unfortunate consequence of our interpretation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a, is that simple use of a controlled substance analogue is apparently not prosecutable in the military, I nevertheless am unable to find any authority which contradicts the analysis and conclusions of the majority opinion. To close this loophole, it would appear that a legislative modification of Article 112a is necessary to change this result, if desired.

However, simple logic would lead one to the following analysis:

> 1. Congress says "controlled substance analogue[s] shall . . . be treated . . . as a controlled substance in Schedule I." 21 USC § 813.
>
> 2. Congress says it is illegal for a military member to wrongfully *use*, possess, manufacture, or distribute

a controlled substance which "is listed in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812)." Art. 112a.

3. To "treat" in this context means "to regard and deal with in a specified manner—usually used with *as*" *Webster's New Collegiate Dictionary* 1235 (1979).

Therefore, I conclude that when Congress said to treat an analogue as if it were a controlled substance, it meant to consider the analogue as included on the list for purposes of making the analogue an illegal substance. Thus, I would have no problem *at all* in holding that the wrongful use, possession, or distribution of controlled substance analogues can be "treated" as a Schedule I drug under Article 112a.

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